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Montana's Spendthrift Trust Doctrine: Analysis and Recommendations

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MONTANA'S SPENDTHRIFT TRUST DOCTRINE: ANALYSIS AND RECOMMENDATIONS

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I. INTRODUCTION

Trusts are frequently a vehicle to provide income or principal to a beneficiary.[1] Generally, the beneficiary may transfer her interest and third party claimants may reach her interest in the trust.[2] If, however, the settlor imposes restraints on the alienation of the beneficiary's interest, this is referred to as a spendthrift trust.[3] Spendthrift trust provisions pervade most modern trusts.[4] The vast majority of states recognize spendthrift trusts as valid, yet these states nearly all provide for exceptions to spendthrift trusts under certain circumstances.[5] Montana's spendthrift trust doctrine is unique because it allows the severe restraints in spendthrift trusts to operate without many of the exceptions imposed by the courts and legislatures of other states.[6] Thus, the spendthrift trust protection for the beneficiary's interest is stronger in Montana than in almost any other state.

Part II of this Comment provides an overview of spendthrift trusts, including a brief history of their evolution. This part also examines exceptions to spendthrift trusts created by legislatures and courts in the United States, including the rationales given for restricting spendthrift trusts. Part III of this Comment analyzes the policies that underlie spendthrift trusts and their exceptions. Part IV suggests revisions to Montana's spendthrift trust statutes.

This Comment suggests that Montana's spendthrift trust statutes[7] should be revised for several reasons. First, current

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1. ERWIN N. GRISWOLD, SPENDTHRIFT TRUSTS 2 (2d ed. 1947).

2. *Id.* at 9-10.

3. *Id.* at 2-3; RESTATEMENT (SECOND) OF TRUSTS § 152(2) (1957) [hereinafter RESTATEMENT]. Unlike in a discretionary trust, the restraint on alienation in a spendthrift trust does not depend on the shield of trustee discretion. *See infra* notes 133-37 and accompanying text.

4. GEORGE G. BOGERT & GEORGE T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 222, n.7 (rev. 2d ed. repl. vol. 1992).

5. *See, e.g.*, ARIZ. REV. STAT. ANN. § 14-7707 (1995) (allowing the beneficiary's interest in a spendthrift trust to be reached for child and spouse support, necessary services provided to the beneficiary or the trust interest, and government claims); *see also infra* notes 86-120 and accompanying text.

6. *See infra* notes 72-85 and accompanying text.

7. MONT. CODE ANN. §§ 72-33-301 to -302 (1995).

statutes governing spendthrift trusts contradict important policy considerations in Montana. Second, other trust types are available that, if used instead of spendthrift trusts, accomplish many of the same goals as spendthrift trusts without their negative implications. The spendthrift trust statutes thus may be revised without preventing a potential settlor from providing for a beneficiary. Third, the spendthrift trust statutes conflict with other Montana statutes, e.g., the statutes which facilitate efforts to collect child support.[8] In sum, Montana should modernize its spendthrift trust doctrine to recognize the competing policy interests and to respond to the current needs of society.

II. BACKGROUND

A. The Practical Impact of Spendthrift Trusts

Unless the trust expresses otherwise, the beneficiary of a trust can transfer his interest in the trust.[9] Third party creditors can also reach the beneficiary's interest to satisfy their claims.[10] However, a spendthrift trust provision allows a settlor to prevent both the beneficiary of the trust from alienating the beneficiary's interest voluntarily, and third party claimants from reaching this interest.[11]

No specific language is necessary to create a spendthrift trust.[12] However, a typical example of the language used in a spendthrift provision is:

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8. *See, e.g.*, MONT. CODE ANN. § 40-5-242 (1995).

9. GRISWOLD, *supra* note 1, at 9-10; BOGERT & BOGERT, *supra* note 4, § 188, at 456-71; *see, e.g.*, Hull v. Rolfsrud, 65 N.W.2d 94, 105 (N.D. 1954) (explaining that when the trust does not expressly restrain the beneficiary, he can transfer his interest in the trust).

10. GRISWOLD, *supra* note 1, at 9-10.

11. *Id.* at 2. An example may best explain the concept. Mr. Jones, unemployed, is the beneficiary of a trust and begins to receive $5,000 per month of the trust income. To fulfill his child support obligations, Mr. Jones assigns $1,000 of his trust interest each month to his former wife, Ms. Jones, for the support of their children. The trustee refuses to distribute directly to Ms. Jones, stating that a provision in the trust, a spendthrift provision, prevents Mr. Jones from assigning his interest. *See* MONT. CODE ANN. § 72-33-301 (1995). Ms. Jones is left hoping that Mr. Jones will fulfill his support obligation when he receives each disbursement from the trust.

Now further imagine the situation in which Mr. Jones refuses to make his support payments after receiving each monthly payment from the trust. Ms. Jones attempts to execute a lien against Mr. Jones' interest in the trust. Her claim is denied because it cannot prevail over the spendthrift provision. *Id.*; *see also infra* notes 164-69 and accompanying text.

12. RESTATEMENT, *supra* note 3, § 152 cmt. c.

> No interest of any beneficiary of any trust created hereunder shall be subject to sale, assignment, pledge, or transfer by any beneficiary in any form or manner whatsoever, nor shall the principal of the trust or the income arising therefrom be liable for any debt of or any judgment against any beneficiary through the process of any court.[13]

A spendthrift trust provision is a powerful tool for the settlor. The settlor can use it to ensure the support of the beneficiary without concern that the beneficiary could ever squander or assign his interest. The spendthrift provision also frees the settlor from relying on the discretion of the trustee to protect the beneficiary's interest, as required in a discretionary trust.

For the beneficiary, the spendthrift trust can be both a curse and a blessing. The curse is that the beneficiary receives a property interest but not the right to alienate that interest. The blessing is that the spendthrift provision bars third parties from reaching the beneficiary's interest. Spendthrift trusts thus pose a dilemma. The dilemma arises because the protection of the spendthrift trust conflicts with other policy goals of society.[14] Some of these other goals are the support of children,[15] the payment of tax obligations,[16] and the general belief that people should pay their debts. No creditor, no matter how justified, can reach the beneficiary's interest in a valid spendthrift trust in Montana.[17] Plainly stated, the spendthrift trust allows the beneficiary to rely on a property interest, without concern that others will take that interest away.

The dilemma of spendthrift trusts is perhaps best illustrated by two eloquent characterizations, one validating spendthrift trusts and the other criticizing them. One court, faced with interpreting a spendthrift trust, asked:

> Why should not a father having a dissolute, improvident or unfortunate son, be able to so bestow his own property as to protect that son from penury and want? Why should not a loving wife be allowed to so deposit her separate estate in the hands of a trustee so as to keep her aged, unfortunate, disso-

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13. Lundgren v. Hoglund, 219 Mont. 295, 300, 711 P.2d 809, 812 (1985).

14. This dilemma is external to the trust itself. However, there is also an internal dilemma, pitting the intent of the settlor to control distribution against the beneficiary's right to exercise her interest in the property as she sees fit.

15. *See infra* notes 164-69 and accompanying text.

16. *See infra* notes 153-55 and accompanying text.

17. *See infra* notes 72-75 and accompanying text. *But see infra* notes 159-63 and accompanying text.

> lute, or improvident husband from trudging his weary way over the hill to the poorhouse? Why should not any one be allowed to use his own property so as to keep the gaunt wolf of grinding poverty from the home door of those near and dear to his heart?[18]

A prominent critic of spendthrift trusts encouraged a different perspective:

> That grown men should be kept all their lives in pupilage, that men not paying their debts should live in luxury on inherited wealth, are doctrines as undemocratic as can well be conceived . . . . The general introduction of spendthrift trusts would be to form a privileged class, who could indulge in every speculation, could practise every fraud, and yet, provided they kept on the safe side of the criminal law, could roll in wealth. They would be an aristocracy, though certainly the most contemptible aristocracy with which a country was ever cursed.[19]

The dilemma, of course, is that both viewpoints are valid. A major tenet of trust law is that the settlor's intent must be realized. The settlor is able to control fully gifts to the beneficiary while alive, so the settlor sees no reason why he should not be able to do so in a trust. However, another general tenet of law is that debts should be paid, so restriction of the settlor's intent may be appropriate.[20]

The practical ramifications of spendthrift trusts in certain contexts are dramatic. To the extent that state law recognizes spendthrift trusts, a beneficiary's interest in a spendthrift trust is not included in the estate of the beneficiary in bankruptcy.[21] The beneficiary's interest in a spendthrift trust also might not be included in determining whether she is eligible for public assistance.[22] One commentator stated that the spendthrift trust has

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18. Guernsey v. Lazear, 41 S.E. 405, 410 (W. Va. 1902) (Brannon, J.).

19. JOHN C. GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY § 211, at 246-47 (2d ed. 1895).

20. Since spendthrift trusts are primarily a matter of state law and policy drives their acceptance or rejection in each state, their validity varies greatly by jurisdiction. *See* BOGERT & BOGERT, *supra* note 4, § 222, at 380-81.

21. Under bankruptcy law, the interest in a spendthrift trust will be excluded from the bankruptcy estate if the state deems spendthrift trusts valid under "applicable nonbankruptcy law." 11 U.S.C. § 541(c)(2) (1994). *See generally* Jack E. Karns, *ERISA Qualified Pension Plan Benefits as Property of the Bankruptcy Estate: The Unanswered Questions After* Patterson v. Shumate, 16 CAMPBELL L. REV. 303 (1994) (discussing that the anti-alienation provisions in ERISA plans would protect the assets in a pension account even in a state that did allow attachment of a beneficiary's interest in a spendthrift trust).

22. *See infra* notes 111-14, 156-63 and accompanying text; Mayer Y. Silber, *The*

always been "a creditor-avoidance technique."[23] Indeed, spendthrift trusts often seem to contradict ordinary notions of personal financial responsibility.

It should be observed that the interest in a spendthrift trust is inalienable only until distributed to the beneficiary.[24] Once the beneficiary receives the disbursement, his creditors can reach that amount.[25] The beneficiary may commit herself to paying the proceeds to another in at least three ways: by (1) requesting the trustee to pay the third party, (2) executing a power of attorney to the third party to act as distributee of the beneficiary's interest, or (3) contracting with the third party to pay upon receiving the distribution.[26] With these methods, the beneficiary has the flexibility not to alienate, but to promise to alienate, his interest.[27]

Yet, these methods may not satisfy creditors and others acting to reach the beneficiary's interest. First, the creditor may not be willing to wait to receive the beneficiary's interest under a promise by the beneficiary. For example, if the creditor received, in the alternative, a court judgment against the beneficiary's interest, the creditor would have the opportunity to borrow against the judgment. Such a judgment, however, is not possible against a spendthrift trust. Second, with only a promise by the beneficiary to pay, the creditor might have to chase the beneficiary and her money or attempt to snare the money just as it is distributed to the beneficiary.[28] Third, under these methods the creditor does not stand as a beneficiary to the trust, with all of a beneficiary's powers to compel a trustee to obey the terms of the trust.[29] Even if the creditor were able to enforce the beneficiary's right to an interest in a spendthrift trust, the creditor could do no better than hold the trustee to the terms of the trust. The spendthrift provision would bar the creditor from assigning her interest, or hastening the distributions from the

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Effect of a Trust on the Eligibility or Liability of the Trust Beneficiary for Public Assistance, 26 REAL PROP. PROB. & TR. J. 133, 144-46 (1991).

23. PAUL G. HASKELL, PREFACE TO THE LAW OF TRUSTS 32 (1975).

24. RESTATEMENT, *supra* note 3, § 152 cmt. j.

25. *Id.*

26. John P. Ludington, Annotation, *Validity and Construction of Beneficiary's Arrangement for Payment to Another, As They Become Due, of Sums Due Under Spendthrift Trust*, 83 A.L.R.3D 1142, 1143 (1978).

27. *Id.*

28. Adam J. Hirsch, *Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives*, 73 WASH. U. L.Q. 1, 2 (1995).

29. *See* HASKELL, *supra* note 23, at 125.

trustee.

Thus, a spendthrift provision practically requires that the creditor bring successive actions against the beneficiary after each distribution, and each action will reach only the distributed amount. As compared with the transaction costs of a single action by a creditor to gain the right to receive distributions directly from the trust, the pragmatic effect of the spendthrift trust is to make recovery impracticable and too costly.[30] Moreover, when multiple creditors wish to reach the beneficiary's interest, determining which creditor's claim should take priority against the beneficiary's interest after distribution may create confusion. The spendthrift provision thus frustrates the satisfaction of worthy claims.

B. History of Spendthrift Trusts

1. Early History of Spendthrift Trusts in the United States

Courts in the United States generally adopted the English courts' resistance to restraints on the alienation of equitable interests[31] until the late 19th century,[32] yet spendthrift trusts

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30. *But see In re* Marriage of Becker, 858 P.2d 480, 483 (Or. Ct. App. 1993) (ordering the beneficiary to pay a certain sum to the creditor on the date of distribution from the trust, not directing that the beneficiary's interest itself would satisfy the claim).

31. The original idea behind spendthrift trusts arose to protect the beneficiary not from herself or her creditors, but from her family. The predecessor of the spendthrift trust protected married women's property from the influence and pressures of their husbands. BOGERT & BOGERT, *supra* note 4, § 221, at 374; GRISWOLD, *supra* note 1, at 10; Willard M. Bushman, *The (In)Validity of Spendthrift Trusts*, 47 OR. L. REV. 304, 305 (1968). In the 18th century English social structure, husbands often exercised complete control of property acquired independently by their wives. Bushman, *supra*, at 305. The Court of Chancery, knowing that a wife might be compelled by her husband to relinquish control of her property, began to approve of trust provisions disallowing the alienation of the wife's interest. BOGERT & BOGERT, *supra* note 4, § 221, at 374. However, the English courts never went beyond the "special case" protecting the property that married women acquired independently. *Id.* at 376. To this day, English law holds to the general tenet that equitable life interests, such as a beneficiary would have in a spendthrift trust, are fully alienable. *Id.* English practitioners, unable to extend spendthrift trusts beyond the protection of the property of married women, developed discretionary, blended, and protective trusts to protect and control the beneficiary's interest. *Id.* at 376-80.

32. Bushman, *supra* note 31, at 306 (noting the acceptance of the English rule by early American courts, and the first American treatise on trusts in 1872); *see, e.g.*, Nichols v. Levy, 72 U.S. (5 Wall.) 433 (1866):

> It is a settled rule of law that the beneficial interest of the *cestui que trust*, whatever it may be, is liable for the payment of his debts. It cannot be so fenced about by inhibitions and restrictions as to secure to it the inconsistent characteristics of right and enjoyment to the beneficiary and immunity

had appeared by procedural happenstance in Pennsylvania during that period.[33] Early in the 1800s, the courts of Pennsylvania had no equity powers; therefore, the interest of the beneficiary was safe from creditors for the simple reason that creditors could not pursue an action at law against an equitable interest in a trust.[34] By the time that the Pennsylvania courts acquired equity powers, spendthrift trusts were entrenched, and courts in other states routinely cited Pennsylvania cases in deciding spendthrift issues.[35]

This Pennsylvania law was subsequently cited in what has been, perhaps, the most influential dictum in the history of American trust law: the statement in *Nichols v. Eaton*[36] of United States Supreme Court Justice Miller. Despite its faulty use of precedent,[37] the *Nichols* dictum gained attention, and many oth-

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from his creditors.

Id. at 441.

33. GRISWOLD, *supra* note 1, § 26, at 21.

34. *Id.*

35. *Id.* at 22.

36. 91 U.S. 716 (1875). Justice Miller wrote:

> We do not see . . . that the power of alienation is a *necessary* incident to a life-estate in real property, or that the rents and profits of real property and the interest and dividends of personal property may not be enjoyed by an individual without liability for his debts being attached as a necessary incident to such enjoyment. This doctrine is one which the English Chancery Court has ingrafted upon the common law for the benefit of creditors, and is comparatively of modern origin. We concede that there are limitations which public policy or general statutes impose upon all dispositions of property, such as those designed to prevent perpetuities and accumulations of real estate in corporations and ecclesiastical bodies. We also admit that there is a just and sound policy peculiarly appropriate to the jurisdiction of courts of equity to protect creditors against frauds upon their rights, where they be actual or constructive frauds. But the doctrine, that the owner of property, in the free exercise of his will in disposing of it, cannot so dispose of it, but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors, though that may soon deprive him of all the benefits sought to be conferred by the testator's affection or generosity, is one which we are not prepared to announce as the doctrine of this court.

Id. at 725.

37. Unfortunately, Justice Miller erred in explaining spendthrift trusts on two counts. First, the English chancery courts did not defend the alienability of the beneficiary's interest to aid creditors, but to continue the parallel to the doctrine of the alienability of legal interests. IIA AUSTIN W. SCOTT & WILLIAM F. FRATCHER, THE LAW OF TRUSTS, § 152, at 85-86 (4th ed. 1987). Second, the view of the chancery courts, that a beneficiary's interest should be alienable, was not of comparatively modern origin, but had existed for centuries. GRISWOLD, *supra* note 1, §§ 3-5; GRAY, *supra* note 19, § 168, at 161-62. For an enlightening discussion of philosophical tensions within 19th century property law, see Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189 (1985).

er state courts adopted Justice Miller's argument.[38] The most renowned critic of spendthrift trusts, Professor John C. Gray, railed against the spread of spendthrift trusts in his *Restraints on the Alienation of Property*.[39] However, by the second edition of his book in 1895, only twenty years after *Nichols*, eight states upheld spendthrift trusts, and four more states had discussed them favorably.[40] After Gray's time, the premiere treatise on spendthrift trusts was the work of Erwin N. Griswold,[41] a Dean of the Harvard Law School, who first collected and cataloged spendthrift trust law in 1936.[42] By then, only nine states had not spoken on spendthrift trusts.[43] Of the remaining states, Griswold found only ten states that did not recognize these trusts, at least to some extent.[44] Today, 43 jurisdictions accept in some way the validity of spendthrift trusts.[45]

Current commentators continue to debate the policies of spendthrift trusts, generally calling for less use of spendthrift trusts and an increase in the exceptions to spendthrift trusts.[46] Courts continue to struggle with spendthrift trusts, confusing them with other trusts,[47] or wrestling with the thorny policy dilemma spendthrift trusts create.[48] Likewise, legislatures in

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38. IIA SCOTT & FRATCHER, *supra* note 37, § 152, at 86.

39. GRAY, *supra* note 19, at iii-xii, 246-47.

40. ERWIN N. GRISWOLD, SPENDTHRIFT TRUSTS 32-33 (1936).

41. *Id.*

42. *Id.* A second edition of *Spendthrift Trusts* was published in 1947.

43. GRISWOLD, *supra* note 40, § 53.

44. *Id.* § 56, at 44. Griswold's research included the jurisdictions of Alaska, Hawaii, and the District of Columbia.

45. *See infra* notes 86-120 and accompanying text; *see also* BOGERT & BOGERT, *supra* note 4, § 222, n.59. *But see* MISS. CODE ANN. § 89-1-43 (1972); N.H. REV. STAT. ANN. § 498:8 (1983); N.C. GEN. STAT. § 36A-115 (1991). Currently, the laws of Alaska, Idaho, Utah, and Wyoming do not declare spendthrift trusts either valid or invalid.

46. *See, e.g.*, Anne S. Emanuel, *Spendthrift Trusts: It's Time to Codify the Compromise*, 72 NEB. L. REV. 179 (1993); Carolyn L. Dessin, *Feed a Trust and Starve a Child: The Effectiveness of Trust Protective Techniques Against Claims for Support And Alimony*, 10 GA. ST. U. L. REV. 691 (1994). One scholar defends spendthrift trusts by analyzing their psychological impact on the beneficiary and their financial impact on the credit market, concluding that spendthrift trusts are necessary and valid. Hirsch, *supra* note 28. *But see* Bushman, *supra* note 31, at 315-17.

47. *See, e.g.*, Domo v. McCarthy, 612 N.E.2d 706, 709 (Ohio 1993) (confusing a spendthrift provision with a provision actually triggering a protective trust); Payer v. Orgill, 191 N.E.2d 373 (Ohio Ct. C.P. 1963) (confusing spendthrift provisions with discretionary and support provisions and provisions creating a protective trust).

48. *See, e.g.*, Scott v. Bank One Trust Co., 577 N.E.2d 1077, 1082-84 (Ohio 1991) (denying creditor from reaching beneficiary's trust interest in a bankruptcy proceeding); Parscal v. Parscal, 196 Cal. Rptr. 462, 465-66 (Cal. Ct. App. 1983) (preferring child support enforcement over protection of pension benefits); Wife, J.B.G. v.

most states have adopted unique statutes addressing spendthrift trusts, seemingly attempting to answer a particular question, yet leaving open many issues pertaining to these trusts.[49]

2. *Montana's Spendthrift Trust History*

a. *The First Statutes*

Montana has its own unique spendthrift trust history. Montana's original spendthrift trust statutes[50] can be traced to 1828 New York statutes.[51] These statutes were part of a massive reform of property law in New York.[52] Although the New York legislature intended to abolish all trusts of real property, it decided to allow the restraint on alienation for amounts necessary to educate and support the beneficiary.[53] These statutes were later included in the "Field Code" that was adopted in California.[54] When Montana enacted its first spendthrift trust statutes in 1895, it used California's statutes as a model.[55] Montana's statutes were slightly different from both the New

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Husband, P.J.G., 286 A.2d 256, 259 (Del. Ch. 1971) (ordering that spouse support payments be made from spendthrift trust income). *See generally* C. R. McCorkle, Annotation, *Validity of Spendthrift Trusts*, 34 A.L.R.2D 1335 (1954) (summarizing case law decisions concerning spendthrift trusts).

49. *See, e.g.*, 20 PA. STAT. ANN. § 6103(a) (1975 & Supp. 1995) (allowing the income of a beneficiary of a spendthrift trust to release his interest if the result would pass his interest to a descendant of the beneficiary); VA. CODE ANN. § 55-19 (Michie 1995) (allowing creditors to reach the beneficiary's interest in excess of $500,000).

50. The relevant sections of the Revised Codes of Montana provided:

> 6788. Profits of land liable to creditors in certain cases. When a trust is created to receive the rents and profits of real property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum that may be necessary for the education and support of the persons for whose benefit the trust is created, is liable to the claims of the creditors of such a person, in the same manner as personal property which cannot be reached by execution.
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> 6794. Transfer by beneficiary of interest in trust forbidden. The beneficiary of a trust for the receipt of the rents and profits of real property, or for the payment of an annuity out of such rents and profits, cannot transfer or in any manner dispose of his interest in such trust.

REV. CODES MONT. §§ 6788, 6794 (1921), *quoted in* GRISWOLD, *supra* note 1, § 199.

51. GRISWOLD, *supra* note 1, § 199.

52. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 210-12 (1973).

53. Alexander, *supra* note 37, at 1199.

54. GRISWOLD, *supra* note 1, § 76.

55. *Id.* § 199; *see also* Andrew P. Morriss, *"This State Will Soon Have Plenty of Laws"—Lessons From One Hundred Years of Codification in Montana*, 56 MONT. L. REV. 359 (1995); Robert G. Natelson, *Running with the Land in Montana*, 51 MONT. L. REV. 17, 42 (1990).

York and the California statutes. Unlike California, Montana did not require that the trust instrument expressly authorize a spendthrift trust to create a spendthrift trust; rather, every trust for the profits and rents from real property automatically created a spendthrift trust.[56] Unlike New York,[57] Montana governed only trusts for real property; the statutes did not mention trusts of personal property. In sum, the original Montana statutes defined spendthrift trusts only as to rents and profits from real property, and, even then, the statutes explicitly protected only amounts necessary to support and educate the beneficiary. The law was silent regarding other applications for spendthrift protection, e.g., trusts of personal property.

b. Court Interpretation of the First Statutes

After adoption of the statutes, nearly a century passed before the Montana Supreme Court discussed spendthrift trusts or the spendthrift statutes. In 1985, the Montana Supreme Court decided *Lundgren v. Hoglund*.[58] In *Lundgren*, a testamentary trust of personal property with a spendthrift provision[59] directed that two-thirds of the trust income go to the beneficiary during his life.[60] The beneficiary assigned his share to his creditors to satisfy certain unsecured loans.[61] When the creditors sought the beneficiary's share prior to payment by the trustee, the trustee refused them, relying on the spendthrift provision.[62] The district court ordered the trustee to pay the beneficiary's income to the creditors.[63] The Montana Supreme Court adopted the common law of other states, held "spendthrift provisions to be valid in Montana," and unanimously reversed the lower court.[64]

The court in *Lundgren* relied on Minnesota and Wisconsin decisions[65] to find Montana's statute[66] applied only to real

56. GRISWOLD, *supra* note 1, § 76.

57. The New York statute had since been revised to allow restraints on a beneficiary's interest in personal property, as well as real property. *Id.* § 69.

58. 219 Mont. 295, 711 P.2d 809 (1985).

59. *See supra* text accompanying note 13.

60. *Lundgren*, 219 Mont. at 297, 711 P.2d at 810.

61. *Id.*

62. *Id.*

63. *Id.* at 297, 711 P.2d at 811.

64. *Id.* at 299-300, 711 P.2d at 812.

65. *Lundgren*, 219 Mont. at 301-02, 711 P.2d at 813 (citing *In re* Schmidt's Will, 97 N.W.2d 441 (Minn. 1959)); *In re* Moulton's Estate, 46 N.W.2d 667 (Minn. 1951); Erickson v. Erickson, 267 N.W. 426 (Minn. 1936); Lamberton v. Pereles, 58

property.[67] In *Lundgren*, the property in question was entirely personal property. The court relied on a California decision to find that the phrase in the statute, "valid direction for accumulation,"[68] applied only to "unexpended portions of income."[69] The trust instrument in *Lundgren* had a valid direction that the accumulation should be added to the principal. Thus, the court found that Montana's spendthrift statute did not apply to the trust.[70] Nevertheless, the court found that the creditors could not reach the beneficiary's interest in the trust, because the court had already adopted the common law recognizing spendthrift trusts.

In sum, the *Lundgren* decision significantly expanded spendthrift trust doctrine in Montana. The *Lundgren* holding allowed not only spendthrift trusts for real property, but also spendthrift trusts of personal property. The court did not limit spendthrift trusts in any way or to any purpose.[71]

3. *The 1989 Revision of Montana's Spendthrift Statutes*

In the 1989 session, the Montana legislature thoroughly rewrote Montana's trust statutes,[72] including the spendthrift

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N.W. 776 (Wis. 1894)).

66. MONT. CODE ANN. § 72-24-210 (1983) (replacing REV. CODES MONT. § 6788). See *supra* note 50 for the text of this statute.

67. *Lundgren*, 219 Mont. at 301, 711 P.2d at 813.

68. *Lundgren*, 219 Mont. at 301-02, 711 P.2d at 813 (quoting MONT. CODE ANN. § 72-24-210 (1985)).

69. *Lundgren*, 219 Mont. at 302, 711 P.2d at 813 (citing *In re* Estate of Lawrence, 72 Cal. Rptr. 851, 854-55 (Cal. Ct. App. 1968)).

70. *Lundgren*, 219 Mont. at 302, 711 P.2d at 813.

71. One year after *Lundgren*, in *In re* Anderson, 43 St. Rep. 1861 (Bankr. D. Mont. 1986), a Montana bankruptcy court distinguished a debtor's interest in a Montana Public Employee's Retirement System fund (which contained a spendthrift provision) from a traditional spendthrift trust that would have been valid under *Lundgren*. *Id.* at 1867. The court found specifically that, unlike a traditional spendthrift trust, the debtor had partially funded the trust and could control benefits by terminating his employment. *Id.* The court further found that the retirement fund was not excluded from the bankruptcy estate under 11 U.S.C § 541(c)(2) (1982 & Supp. III 1985), which excluded spendthrift trusts that were valid under state law. *Id.* at 1864. Note that the court's interpretation, that ERISA pension funds were included in the bankruptcy estate, was later overturned by the United States Supreme Court decision in Patterson v. Shumate, 504 U.S. 753 (1992). *See supra* note 21 and accompanying text.

72. Notwithstanding this Comment's specific criticism of the spendthrift trust statutes adopted in 1989, the members of the committee that created the 1989 revisions deserve great credit. The legislation clarified and improved significantly Montana's other trust laws. The goals of the trust law revisions were to update the language, reorganize the statutes, and eliminate inconsistencies. *Hearings on S.B. 333*

trust statutes.[73] The new statutes extended spendthrift trust protection to trusts of personal property. Also, the new statute prevented creditors from accessing *any* of the beneficiary's interest protected by a spendthrift provision, not only that "sum necessary for the education and support of the beneficiary" as the old statute declared. Thus, the new statutes significantly expanded the parameters of protection available through the use of spendthrift trusts, reflecting the broader acceptance of spendthrift trusts seen in the *Lundgren* decision.

The 1989 revisions recognized the validity of restraints on alienation of a beneficiary's interest in income[74] and principal.[75] At the same time, the legislature, in effect, converted all those trusts "for the education and support of a beneficiary" into spendthrift trusts.[76] Thus, under Montana law, every support

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Before the Senate Comm. on Judiciary, 51st Mont. Leg. (February 10, 1989) (statement by sponsor, Sen. Joe Mazurek); *Hearings on S.B. 333 Before the House Comm. on Judiciary*, 51st Mont. Leg. (March 8, 1989); *see also Committee Strives to Remedy Trust Law Inequities*, MONTANA LAWYER, Dec. 1987, at 5-6.

73. MONT. CODE ANN. §§ 72-33-301 to -306 (1989), enacted §§ 24-29, Ch. 685, L. 1989.

74. Section 72-33-301 of the Montana Code provides:

> Restraint on transfer of income. Except as provided in 72-33-305, if the trust instrument provides that a beneficiary's interest is not subject to voluntary or involuntary transfer, the beneficiary's interest in income under the trust may not be transferred and is not subject to enforcement of a money judgment until paid to the beneficiary.

MONT. CODE ANN. § 72-33-301 (1995). Section 72-33-305 concerns spendthrift trusts to which the trustor becomes a beneficiary.

75. Section 72-33-302 of the Montana Code provides:

> Restraint on transfer of principal. (1) Except as provided in 72-33-305 and subsection (2) of this section, if the trust instrument provides that a beneficiary's interest in principal is not subject to voluntary or involuntary transfer, the beneficiary's interest in principal may not be transferred and is not subject to enforcement of a money judgment until paid to the beneficiary.
>
> 2) After an amount of principal has become due and payable to the beneficiary under the trust instrument, upon petition to the court by a judgment creditor, the court may make an order directing the trustee to satisfy the money judgment out of that principal amount. The court in its discretion may issue an order directing the trustee to satisfy all or part of the judgment out of that principal amount.

MONT. CODE ANN. § 72-33-302 (1995).

76. Section 72-33-303 of the Montana Code provides:

> Trust for support. Except as provided in 72-33-305, if the trust instrument provides that the trustee shall pay income or principal or both for the education or support of a beneficiary, the beneficiary's interest in income or principal or both under the trust may not be transferred and is not subject to the enforcement of a money judgment until paid to the beneficiary.

MONT. CODE ANN. § 72-33-303 (1995).

trust is a spendthrift trust. Further, the legislature validated discretionary trusts[77] and invalidated so-called "self-settled" spendthrift trusts.[78] The 1989 Montana Legislature also ensured that if a beneficiary disclaimed or renounced his interest in a spendthrift trust, that disclaimer or renunciation would not be considered a void "transfer" of interest under the spendthrift trust statutes.[79]

Prior to the 1989 revision, all trusts relating to the profits or rents from real property were spendthrift trusts for the amount needed to support and educate the beneficiary.[80] After the revision, a settlor may create a spendthrift trust concerning real or personal property only if the settlor expresses so in the trust instrument.[81] Because standard practice prior to the revision had been to include a spendthrift provision, this requirement imposed no significant burden upon trust drafters. However, under the 1989 revisions, a beneficiary can transfer, and creditors can reach, any interest of a beneficiary if the trust is without a disabling provision.

The legislative drafters took the language of many of the 1989 statutes directly from California's probate code.[82] However, the drafters omitted many of the exceptions to spendthrift trusts within the California code.[83] Montana's decision to adopt

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77. The pertinent language of section 72-33-304 of the Montana Code is:

> (1) If the trust instrument provides that the trustee shall pay to . . . the beneficiary so much . . . as the trustee is the trustee's discretion sees fit to pay, a transferee or creditor of the beneficiary may not compel the trustee to pay any amount that may be paid only in the exercise of the trustee's discretion.

MONT. CODE ANN. § 72-33-304 (1995). *See generally infra* notes 133-37 and accompanying text.

78. MONT. CODE ANN. § 72-33-305 (1995). A self-settled trust simply describes a trust in which the trustor becomes a beneficiary of the trust he creates.

79. Section 72-33-306 of the Montana Code states: "Disclaimer not a transfer. A disclaimer or renunciation by a beneficiary of all or part of his interest under a trust shall not be considered a transfer under 72-33-301 or 72-33-302." MONT. CODE ANN. § 72-33-306 (1995).

80. *See* MONT. CODE ANN. §§ 72-24-205 (1987) (stating that any transfers by the beneficiary of such a trust were forbidden); MONT. CODE ANN. § 72-24-210 (1987) (stating that the amount necessary for support and education of the beneficiary was protected); Lundgren v. Hoglund, 219 Mont. 295, 301, 711 P.2d 809, 813 (1985).

81. *See* MONT. CODE ANN. §§ 72-33-301 to -302 (1995). For the text of these statutes, see *supra* notes 74-75.

82. MONT. CODE ANN. §§ 72-33-301 to -306 (1989) were drawn from CAL. PROB. CODE §§ 15300-15306 (West 1987). MONT. CODE ANN. (Annotations) §§ 72-33-301 to -306 Official Comments (1994). Note that under CAL. PROB. CODE § 15307 (West 1991) all interest in a spendthrift trust beyond that amount necessary for the support and education of the beneficiary may be reached by judgment creditors.

83. The omissions were noted in the official comments to section 72-33-301 of

California's code without its exceptions is more than just of historical interest. Very few states allow such unfettered use of spendthrift trusts. The 1989 revision placed Montana in a class of only six states with spendthrift statutes that do not impose some limit on spendthrift trusts.[84]

The Montana Supreme Court has yet to interpret the statutes adopted in 1989.[85] A likely issue that the court will have to address in the near future is whether a spendthrift trust is valid against a claim that is compelling for policy reasons. The courts and legislatures in other states have limited spendthrift trusts when faced with such claims. The next section addresses the exceptions to spendthrift trusts in other states.

C. Current Law of Spendthrift Trusts

Although numerous states quickly embraced spendthrift trusts, many of those same states have since restricted the application of spendthrift trusts and redefined their scope.[86] Courts and legislatures in other states accept spendthrift trusts as valid but deny their application in particular situations.[87] The most

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the Montana Code:

> However, the corresponding California section is subject to exceptions for claims for child and spousal support, claims for reimbursement of public support, the right of general creditors to reach maximum of one-fourth of payments due beneficiary, and income in excess of the amount needed for education and support. None of these exceptions are applicable in Montana.
>
> Similarly, this section differs from section 157 of the *Restatement (Second) of Trusts* (1957) which enumerates four classes of claimants who may enforce their claims against the beneficiary's interest in such a trust.

MONT. CODE ANN. (Annotations) § 72-33-301 Official Comments (1994). The official comments provide no explanation as to why the legislative drafters adopted California's statutes without including the exceptions.

84. *See* DEL. CODE ANN. tit. 12, § 3536(a) (1987); IND. CODE ANN. § 30-4-3-2 (Burns 1989); N.M. STAT. ANN. § 42-9-4 (Michie Supp. 1995); R.I. GEN. LAWS § 18-9.1-1 (1988); TEX. PROP. CODE ANN. § 112.035 (West 1995). Rhode Island only recently recognized spendthrift trusts after a long history of prohibiting them. As yet, no exceptions to spendthrift trusts have developed in Rhode Island.

85. *But cf. In re* Ullman, 116 B.R. 228, 231 (Bankr. D. Mont. 1990) (finding a self-settled spendthrift trust did not qualify as a valid spendthrift trust and citing Lundgren v. Hoglund, 219 Mont. 295, 711 P.2d 809 (1985), but not mentioning MONT. CODE ANN. § 72-33-305 (1985), which expressly barred self-settled spendthrift trusts).

86. Hirsch, *supra* note 28, at 73.

87. For example, some states have not allowed a spendthrift trust to insulate the beneficiary's interest in excess of a certain amount. *See, e.g.,* VA. CODE ANN. § 55-19(B) (Michie 1995) (insulating the beneficiary's interest not exceeding $500,000); *see also* Hirsch, *supra* note 28, at 75. Other states have allowed protective provisions only for certain purposes. *See, e.g.* CONN. GEN. STAT. ANN. § 52-321(a) (West 1993)

prevalent exceptions address the type of claim that may be satisfied despite the spendthrift provision. These exceptions fall into seven categories:

> 1) claims arising against a spendthrift trust in which the trustor is one of the beneficiaries;[88]
>
> 2) claims arising from services provided to the trust interest of the beneficiary;[89]
>
> 3) claims by the government;[90]
>
> 4) claims for the support of the beneficiary's children or spouse, including alimony;[91]
>
> 5) claims arising from services provided to the beneficiary;[92]
>
> 6) claims arising from a tort by the beneficiary;[93] and
>
> 7) claims arising from general contracts with the beneficiary.[94]

These categories are ranked roughly in order of acceptance by other states, with the first being the most widely recognized.[95]

The most prevalent exception to spendthrift trusts denies self-settled trusts: the trustor cannot create a spendthrift trust for himself as protection against his creditors.[96] All jurisdictions have this prohibition of self-settled spendthrift trusts.[97] The

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(protecting only trusts for support); N.D. CENT. CODE § 59-03-10 (1995) (protecting only sums necessary to educate and support the beneficiary). Still other states have not allowed the spendthrift trusts to protect certain types of interest, e.g., the corpus of the trust. *See, e.g.*, KAN. STAT. ANN. § 58-2404 (1994) (protecting only interest in trust income from real property); *see also* Hirsch, *supra* note 28, at 74.

88. RESTATEMENT, *supra* note 3, § 156; *see also infra notes* 96-100 and accompanying text.

89. IIA SCOTT & FRATCHER, *supra* note 37, § 157.3; *see also infra* notes 101-03 and accompanying text.

90. RESTATEMENT, *supra* note 3, § 157(a); *see also infra* notes 104-06 and accompanying text.

91. RESTATEMENT, *supra* note 3, § 157(a); *see also infra* notes 107-10 and accompanying text.

92. RESTATEMENT, *supra* note 3, § 157(b); *see also infra* notes 111-14 and accompanying text.

93. BOGERT & BOGERT, *supra* note 4, § 224; *see also infra* notes 115-17 and accompanying text.

94. Emanuel, *supra* note 46, at 198; *see also infra* notes 118-20 and accompanying text.

95. *See* BOGERT & BOGERT, *supra* note 4, § 224.

96. RESTATEMENT, *supra* note 3, § 156; BOGERT & BOGERT, *supra* note 4, § 223; *see, e.g.*, Speed v. Speed, 430 S.E.2d 348, 348-49 (Ga. 1993) (holding self-settled trusts invalid); *In re* Ullman, 116 B.R. 228, 231 (Bankr. D. Mont. 1990) (holding that it is essential in the creation of a spendthrift trust that the settlor and the beneficiary be different persons).

97. Hirsch, *supra* note 28, at 83.

rationale for disallowing the settlor to create a spendthrift trust with himself as a beneficiary is obvious: a settlor should not be able to prevent his creditors from pursuing collection on debts that the settlor incurred.[98] Although one commentator recently proposed relaxing this standard to allow self-settled spendthrift trusts,[99] the rule barring the self-settled spendthrift trust seems deeply embedded in trust law.[100]

Second, a widely-recognized exception to spendthrift trusts is for claims arising from services provided to the trust interest.[101] Included in this category are claims by the trustee for the trustee's services and fees for attorneys who have worked to represent, defend or enforce the trust interest.[102] One rationale for this exception is that the persons who serve the beneficiary's interest should be compensated for their efforts, and that to ignore their claims would unjustly enrich the trust.[103]

The third of the seven types of exceptions to spendthrift trusts addresses claims by the government. For example, any state law permitting the protection of a beneficiary's interest cannot prevent a federal tax lien from reaching the beneficiary's interest.[104] One commentator describes the rationale for this sort of claim as "not based on public policy, but rather on legal impossibility."[105] It is surprising that relatively few states have statutes authorizing the attachment of a spendthrift trust beneficiary's interest to satisfy a state tax obligation.[106]

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98. BOGERT & BOGERT, *supra* note 4, § 223.

99. Hirsch, *supra* note 28, at 84-92 (comparing the spendthrift trust's restraint against voluntary alienation by the beneficiary to other self-disabling restraints, e.g., pension funds and savings accounts).

100. GRISWOLD, *supra* note 1, § 557.

101. RESTATEMENT, *supra* note 3, § 157 cmt. d. *See generally* IIA SCOTT & FRATCHER, *supra* note 37, § 157.3.

102. *See* IIA SCOTT & FRATCHER, *supra* note 37, § 157.3; *see also* RESTATEMENT, *supra* note 3, § 244.

103. *See, e.g.,* Evans & Luptak v. Obolensky, 487 N.W.2d 521, 523 (Mich. Ct. App. 1992) (allowing "attorneys to be paid for their services in enhancing the position of the beneficiary"), *cited in* Emanuel, *supra* note 46, at 196-97 n.89. *But cf.* Schreiber v. Kellogg, 50 F.3d 264, 277 (3rd Cir. 1995) (holding that an attorney might not reach the beneficiary's interest for fees for services rendered, if the services do not actually benefit the beneficiary's interest).

104. *See, e.g., In re* Rosenberg, 199 N.E. 206 (N.Y. 1935), *cert. den.* 298 U.S. 669 (1936); Howard v. United States, 566 S.W.2d 521 (Tenn. 1978); *see also* I.R.C. §§ 6321, 6331 (1988) (authorizing and executing a lien in favor of the U.S. on all present and future rights to real or personal property to satisfy tax liability). *But see In re* Wilson, 140 B.R. 400 (Bankr. N.D. Tex. 1992) (finding no property interest under state law to which a federal tax lien could attach).

105. BOGERT & BOGERT, *supra* note 4, § 224, at 474.

106. State statutes allowing tax claims to reach a beneficiary's interest in a

Fourth, an exception allows the beneficiary's interest to be reached to satisfy claims arising from the support of the beneficiary's children or spouse.[107] Two rationales support this exception: (1) the duty to support is recognized by law[108] and (2) the children and spouse should be considered as additional, though unnamed, beneficiaries of the trust as a practical matter.[109] The spendthrift trust interest is reached less frequently to satisfy a spouse's claim for alimony.[110]

A fifth exception provides that the interest of a beneficiary in a spendthrift trust may be reached to satisfy claims for services provided to the beneficiary as an individual, e.g., for the beneficiary's necessary support or medical care.[111] Twenty-five states have some form of this exception.[112] The rationale for this exception is that the purpose of trusts is often to ensure the health and support of beneficiaries, and any payments made to further that purpose should be recovered by creditors.[113] However, the creditor usually can recover only where "circumstances are such that it would have been an abuse of discretion by the trustee to refuse to expend funds of the trust in procuring the services or goods for the beneficiary."[114]

Sixth, some states recognize an exception whereby the interest in a spendthrift trust may be reached to satisfy a claim aris-

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spendthrift trust include only the following: ARIZ. REV. STAT. ANN. § 14-7707(4) (1995); GA. CODE ANN. § 53-12-28(c)(2) (1995); KY. REV. STAT. ANN. § 381.180(6)(c) (Baldwin 1989).

Also in the category of governmental claims are claims against the interest held by beneficiaries who are non-citizens and are considered "enemies" of the United States. The restraints against reaching an alien enemy's interest in a spendthrift trust are not valid. RESTATEMENT, *supra* note 3, § 157 cmt. f.

107. RESTATEMENT, *supra* note 3, § 157 cmt. b. This exception is held as law in 27 states. BOGERT & BOGERT, *supra* note 4, § 224, at 456-69.

108. *See, e.g.*, Albertson v. Ryder, 621 N.E.2d 480, 483 (Ohio Ct. App. 1993).

109. IIA SCOTT & FRATCHER, *supra* note 37, § 157.1, at 190-92; *see, e.g.*, Howard v. Spragins, 350 So. 2d 318, 322 (Ala. 1977); *cf. In re* Bucklin's Estate, 51 N.W.2d 412, 416-17 (Iowa 1952).

110. BOGERT & BOGERT, *supra* note 4, § 224, at 465-67. Florida, Maryland, Minnesota, Ohio, Pennsylvania, New York, Louisiana, North Carolina, Oklahoma, Oregon, and Texas allow alimony claims against an interest in a spendthrift trust. *Id.*; *see also* MO. ANN. STAT. § 456.080 (Vernon 1992) (removing Missouri's exception to spendthrift trusts for alimony claims, but leaving the exception for spousal support claims valid).

111. BOGERT & BOGERT, *supra* note 4, § 224, at 469-72; *see, e.g., In re* Estate of Dodge, 281 N.W.2d 447, 450-51 (Iowa 1979). *But cf.* Department of Mental Health v. Phillips, 500 N.E.2d 29, 33-34 (Ill. 1986) (holding that the state could not reach the interest in a discretionary support trust if settlor intended otherwise).

112. BOGERT & BOGERT, *supra* note 4, § 224, at 469-72.

113. Emanuel, *supra* note 46, at 195.

114. IIA SCOTT & FRATCHER, *supra* note 37, § 157.2, at 203.

ing from the tortious conduct of the beneficiary.[115] The rationale for this exception generally is that tort creditors are involuntary creditors.[116] Despite the general explosion of tort law during this century, the exception to spendthrift trusts for tort creditors has been accepted, surprisingly, in only three states.[117]

The seventh and last type of exception to spendthrift trusts allows general creditors of the beneficiary to attach the beneficiary's interest. Only California has such a law.[118] One reason that only California has an exception for general judgment creditors is that many states already restrict the protection afforded by spendthrift provisions to only part of the beneficiary's interest, e.g., that amount needed for the support of the beneficiary or, under some statutes, a specific dollar amount.[119] Because the beneficiary's interest is protected only partially, general creditors may reach the portion which the law leaves unprotected. The rationale for this exception has as much to do with the policy of encouraging contracts as it does with the traditional policy that encourages one to pay her debts.[120]

In opposition to these exceptions, the defenders of spendthrift trusts offer two policy arguments. First, the sanctity of the settlor's intent should not be disturbed.[121] Arguably, courts and legislatures should allow settlors to impose whatever terms they wish upon the beneficiary for the trust interest they create. The second reason is that the creditor of the beneficiary has no right

115. *Id.* § 157.5.

116. *Id.* One commentator advocated acceptance of the tort creditor exception and compared it with tax law exclusions from income for tort damages, the general goals of insurance law for the restoration of victims, and bankruptcy law restrictions against the tortfeasor's discharge of tort damage debt in bankruptcy. Laurene M. Brooks, Comment, *A Tort Creditor Exception to the Spendthrift Trust Doctrine: A Call to the Wisconsin Legislature*, 73 MARQ. L. REV. 109, 133-41 (1989).

117. The three states are California, Georgia and Louisiana. CAL. PROB. CODE § 15305.5 (West 1991 & Supp. 1995) (allowing court-ordered restitution for a felony or damages from a felony to be satisfied out of the beneficiary's interest); GA. CODE ANN. § 53-12-28(c)(1) (1995) ("tort judgments"); LA. REV. STAT. ANN. 9:2005(3) (West 1991) ("offense or quasi-offense"); *see* BOGERT & BOGERT, *supra* note 4, § 224. *See generally* William N. Antonis, Note, *Spendthrift Trusts: Attachability of a Beneficiary's Interest in Satisfaction of a Tort Claim*, 28 NOTRE DAME LAW. 509 (1953); Weston C. Overholt, Jr., Note, *Tort Liability of the Beneficiary of a Spendthrift Trust*, 57 DICK. L. REV. 220 (1953).

118. CAL. PROB. CODE § 15306.5 (West 1991) (allowing court to order trustee to satisfy "judgment creditors" with up to 25 percent of the beneficiary's interest).

119. *See supra* notes 86-87 and accompanying text.

120. Emanuel, *supra* note 46, at 198.

121. *Id.*

to expect his claim to be satisfied out of the beneficiary's interest. The creditor had no claim to it before the trust was created, and his actual or constructive notice of the beneficiary's interest in the trust under the spendthrift clause bars his later claim.[122] For these reasons, the proponents of spendthrift trusts resist any exceptions beyond the exception for self-settled spendthrift trusts.

III. ANALYSIS

A. Spendthrift Trusts and Policy

Spendthrift trusts are creatures of policy. Allowing the settlor's intent to control completely is no more inherently logical (or just) than demanding financial accountability from a beneficiary. An analogous balance is played out in bankruptcy. Bankruptcy courts balance the rights of creditors with the policy interest in ensuring a "fresh start" for the applicant.[123] Because spendthrift trusts are creatures of policy, courts, legislators and scholars should subject spendthrift trusts to recurring analysis. The age-old question of spendthrift trusts should be answered periodically in light of current economic and political needs of individuals and communities.

The time has arrived to reconsider Montana's spendthrift trust law. Nearly every state that has adopted spendthrift trust protection for beneficiaries has also imposed exceptions to that protection.[124] Montana has none of the usual exceptions to spendthrift trusts, other than the bar on self-settled spendthrift trusts. The policy dilemma posed by spendthrift trusts requires exceptions to balance the intent of the settlor with the valid claims of creditors. The history of spendthrift trusts in the United States makes clear that spendthrift trusts have rarely been absolute; nor should they be. Montana law should reflect the commonly held exceptions.[125]

Moreover, exceptions to spendthrift trusts do not particularly disrespect a settlor's intent. Other examples exist which show a settlor's right to distribute is not unrestricted. The rule against perpetuities,[126] the spouse's elective share of an estate,[127] and

122. Emanuel, *supra* note 46, at 192-93 (citing Nichols v. Eaton, 91 U.S. 716, 726-27 (1875)); *see, e.g.*, Lundgren v. Hoglund, 219 Mont. 295, 300, 711 P.2d 809, 812 (1985); *cf.* Bushman, *supra* note 31, at 315-16.

123. *See* Karns, *supra* note 21.

124. *See supra* notes 96-120 and accompanying text.

125. *See infra* notes 174-78 and accompanying text.

126. MONT. CODE ANN. §§ 72-2-1001 to -1005 (1995).

restrictions against illegal trusts[128] demonstrate that the direction of a settlor's intent can be changed by outside policies.[129] Another example is that Montana historically limited the amount that could be given in trust for charitable purposes.[130] Thus, although Montana courts defer regularly to the settlor's expressed intent,[131] the settlor's intent should not be considered sacred.[132]

B. Alternatives to Spendthrift Trusts

Limiting spendthrift trusts with exceptions does not necessarily hamper the settlor's intent to provide for the beneficiary. The primary goals for creating a spendthrift trust can be served by other types of trust provisions. The discretionary trust and the support trust are examples of alternative types of trusts which, like the spendthrift trust, allow the settlor to protect the beneficiary's interest.

A discretionary trust subjects the beneficiary's interest in income or principal to the discretion of the trustee, to the extent that discretion is directed by the settlor.[133] Unlike the spendthrift trust, in which the beneficiary can sue to enforce the terms of the trust, a beneficiary of a discretionary trust may not contest the reasonable discretion of the trustee.[134] One should note that the spendthrift and discretionary provisions may be combined in the same trust to provide extra insulation for the trust assets from alienation by the beneficiary.[135]

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127. MONT. CODE ANN. § 72-2-221 (1995).

128. MONT. CODE ANN. §§ 72-33-204, -411 (1995).

129. GRISWOLD, *supra* note 1, § 553; HASKELL, *supra* note 23, at 50-60.

130. GRISWOLD, *supra* note 1, § 553, at 632 (citing REV. CODES MONT. § 7015 (1921)).

131. For a recent example, note *In re* Estate of Lindgren, 268 Mont. 96, 100, 885 P.2d 1280, 1282 (1994) (stating "[t]he [c]ourt should determine the testator's intent, *the ruling concern*, by analyzing the will in its entirety . . . .") (emphasis added).

132. *See* Alexander, *supra* note 37, at 1266.

133. RESTATEMENT, *supra* note 3, § 155.

134. *Id.* § 155 cmt. b; *see, e.g., In re* Tone's Estates, 39 N.W.2d 401, 406 (Iowa 1949) (denying the beneficiary's request for an order requiring the trustee of a discretionary trust to advance funds to cover the beneficiary's attorney fees). Of course, if a settlor tied the trustee's discretion to some standard, e.g., the support of the beneficiary, a court may enforce the standard. *See, e.g.,* Martin v. Martin, 374 N.E.2d 1384, 1389-90 (Ohio 1978) (holding that a trustee may be required to distribute to meet the standards of care of the beneficiary, despite term granting "absolute discretion" to trustee). Also, the beneficiary may bring a claim for an abuse of discretion by the trustee. *See generally* HASKELL, *supra* note 23, at 33.

135. RESTATEMENT, *supra* note 3, § 155; *see, e.g.,* Canfield v. Security-First Nat'l

Discretionary trusts, by tying distribution of the beneficiary's interest to the discretion of the trustee, protect the beneficiary's interest from both voluntary and involuntary alienation. Of course, the settlor may hesitate to give the discretion to the trustee.[136] The settlor may also hesitate to use a discretionary trust because the beneficiary could still seize the beneficiary's interest in a litigated claim of abuse of discretion. Still, one can imagine few situations where a discretionary trust would not accomplish the same ends as a spendthrift trust, especially if the discretionary trust also includes a support standard, which would require the trustee to make distributions to ensure a prescribed level of support for the beneficiary.[137]

The other alternative type of trust is the support trust, in which the trustee distributes trust funds as necessary to ensure the support of the beneficiary.[138] Under a typical support trust, the beneficiary normally receives no more than is necessary for support, and does not have the power to assign her interest in the trust.[139] Unlike the spendthrift trust, where the beneficiary's interest is shielded simply by the nature of the trust device, the interest of the beneficiary in a support trust is protected by the purpose the trust is meant to serve, i.e., the support of the beneficiary.[140] The settlor directs the trustee to distribute only for the support of the beneficiary. Any attachment by creditors or assignment by the beneficiary is contrary to the settlor's intent and is void.[141] Thus, the support trust is a more focused tool than the spendthrift trust, yet is subject to challenge by third parties who bring claims allegedly arising from the necessary support of the beneficiary.

The discretionary and support trust alternatives[142] allow

Bank, 87 P.2d 830, 834 (Cal. 1939).

136. The strength of the discretionary trust is its complete insulation of the trust from any claim not approved by the trustee. Yet, this is also the discretionary trust's weakness. Possibly contrary to the settlor's motive, the trustee may distribute too much or may deny any distribution whatever to the beneficiary. Emanuel, *supra* note 46, at 186.

137. *See In re* Estate of Lindgren, 268 Mont. 96, 885 P.2d 1280 (1994).

138. RESTATEMENT, *supra* note 3, § 154. Note that there are at least two variations of the amount of distribution: the distribution could be set at whatever amount is necessary, or at a certain amount for the expressed purpose of support. GRISWOLD, *supra* note 1, § 430.

139. RESTATEMENT, *supra* note 3, § 154; GRISWOLD, *supra* note 1, § 431; BOGERT & BOGERT, *supra* note 4, § 229; *see, e.g.*, Seattle First Nat'l Bank v. Crosby, 254 P.2d 732, 739-40 (Wash. 1953) (holding that the trustee was not required to distribute according to the terms of the property settlement in the beneficiary's divorce).

140. RESTATEMENT, *supra* note 3, § 154 cmt. b.

141. *See In re* Keeler's Estate, 3 A.2d 413, 416-17 (Pa. 1939).

142. Another alternative type of trust is the protective trust. Protective trusts

the settlor to insulate the beneficiary's interest from creditors and from possible abuse of the interest by the beneficiary. In this way, they are identical to spendthrift trusts. These trust alternatives are also recognized by Montana law.[143] A settlor may not wish to use the alternatives because they grant too much discretion to the trustee, but that discretion is the exact means of protecting the beneficiary's interest.[144]

Because the distribution under the alternatives is entirely discretionary and protected by statute, creditors and the beneficiary have no interest to alienate. This is in direct contrast to the spendthrift trust, which bars alienation of a beneficiary's specifically-defined interest. No policy dilemma exists under the alternatives to spendthrift trusts. The settlor relinquishes real control to the trustee under the alternatives. The beneficiary, too, is subject to the trustee's discretion.

Although the alternatives do not provide the "absolute" protection of spendthrift trust, the "absolute" protection of a spendthrift trust is a misperception. The law is written in absolute terms, but lessons from other states indicate that Montana practitioners may be surprised to find their spendthrift trusts invaded. Courts and legislators have consistently created exceptions for policy reasons.[145]

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impose a restrictive condition upon the beneficiary, with the intent to protect the beneficiary's interest. If attempts are made to alienate the beneficiary's interest, either by the beneficiary or a third party, the beneficiary's interest forfeits from an absolute right, to an interest in a discretionary trust. *See* Domo v. McCarthy, 612 N.E.2d 706, 709 (Ohio 1993); HASKELL, *supra* note 23, at 39-40. In some protective trusts, the beneficiary's interest is completely forfeited, and is not replaced by a discretionary trust interest. Hirsch, *supra* note 28, at 2 n.5. Protective trusts are most often seen in trusts governed by English law. *See supra* note 31 and accompanying text. They are used less often by settlors in the United States because spendthrift trusts are available, and possibly because the result of the protective trust subjects the beneficiary's interest to the trustee's discretion.

The protective trust is similar to the spendthrift trust because the beneficiary and third parties are restrained from alienating the beneficiary's interest. Dessin, *supra* note 46, at 699. The interest of the beneficiary in a spendthrift trust is defined and not subject to the discretion of the trustee. *See supra* notes 9-13 and accompanying text. In a protective trust, the beneficiary's interest becomes subject to the trustee's discretion if the beneficiary or a third party attempts alienation of the interest. However, until such an attempt is made, the trust is not a discretionary trust. The trustee must simply implement the terms of the trust.

143. MONT. CODE ANN. §§ 72-33-303 to -304 (1995). Note that a protective trust would operate as a discretionary trust under § 72-33-304 after an attempt at alienation of the beneficiary's interest. *See supra* note 142.

144. *See, e.g., In re* Estate of Lindgren, 268 Mont. 96, 885 P.2d 1280 (1994).

145. *See supra* notes 96-120 and accompanying text.

C. *The Spendthrift Statutes Contradict Other Montana Statutes*

Montana's statutes concerning the alienation of a beneficiary's interest are inconsistent with other sections in the Code concerning enforcement of support orders,[146] the elective share,[147] tax collection,[148] and the execution of judgments.[149] All of these statutes evidence policy goals that contradict the spendthrift trust goal of insulating the beneficiary's interest; the intent of these laws is to access all property interests. As well, the spendthrift trust statute's bar against execution at law frustrates the strong policy of enforcing orders for spousal and child support. Moreover, spendthrift trust protection mocks the exemption statute. The policy of the exemption statute is intended to list exclusively the property interests that are safe from execution.[150]

The question arises whether any exceptions to the validity of spendthrift trusts are *de facto* present in Montana. As with every other state, Montana law invalidates self-settled spendthrift trusts.[151] Claims arising in the defense or protection of the trust itself would also probably be successful under Montana law.[152]

Montana law is largely silent concerning the other exceptions. As to claims arising from the beneficiary's tax obligations, the beneficiary's interest in a spendthrift trust would be reached by a federal tax lien.[153] The issue remains undecided whether a Montana tax lien would be equally successful. Under Montana law, a tax lien would attach to any property of the beneficiary in a court judgment.[154] However, the spendthrift trust statutes bar reaching the beneficiary's interest by court judgment until that interest is paid to the beneficiary.[155] Thus, it appears that

146. MONT. CODE ANN. § 40-5-242 to -248 (1995).
147. MONT. CODE ANN. § 72-2-221 (1995).
148. MONT. CODE ANN. § 15-1-701 to -709 (1995).
149. MONT. CODE ANN. § 25-13-501 (1995).
150. One might argue that spendthrift trusts are equivalent to exemption statutes, in that both operate to shield an interest in property. However, the policy underlying exemption statutes is very different from that underlying spendthrift trusts. Bushman, *supra* note 31, at 311-12. Under exemption statutes, a creditor can conceivably take everything from the debtor but the exempted amount. The creditor gets some relief, unlike the spendthrift trust that prevents any access by the creditor to any amount. *Id.* Exemption statutes also exempt the basic necessary means of living; spendthrift trusts can reserve even a lavish surplus to the beneficiary. *Id.*
151. MONT. CODE ANN. § 72-33-305 (1995).
152. *See supra* notes 101-03 and accompanying text.
153. *See supra* notes 104-05 and accompanying text.
154. MONT. CODE ANN. § 15-1-701(2) (1995).
155. MONT. CODE ANN. §§ 72-33-301 to -304 (1995). One possibility is that the

the spendthrift provision would bar the State of Montana from satisfying a tax lien on the beneficiary's interest prior to distribution.

Montana law is ambiguous with regard to claims arising from services provided to the beneficiary. Under Montana statutory law, the state may charge residents of state care or correctional institutions a *per diem*.[156] In setting out what is included in calculating the ability to pay the *per diem*, the Administrative Rules of Montana include income from trusts.[157] Yet, in another section of the Rules, the state includes any "long-term resident's liquid assets which exceed eligibility standards for medicaid . . . *unless . . . protected by law or an order of the court.*"[158] The beneficiary's interest is "protected by law"—by the spendthrift provision as validated by the spendthrift trust statute. Without Montana's spendthrift trust statutes, the beneficiary's interest in the trust would be included in the determination of the beneficiary's ability to pay the *per diem* for his stay at a state institution. So, in this instance, claims arising from the provision of necessaries to the beneficiary may not reach the beneficiary's interest. Because the state is unable to calculate the *per diem* based on a beneficiary's interest in a spendthrift trust, the taxpayers bear the cost burden.

Yet, in a recent case, *In re Estate of Lindgren,*[159] the Montana Supreme Court created an exception for a claim arising from the provision of necessaries to the beneficiary. In this case, the settlor created a discretionary trust to provide for the support of his wife.[160] Although not addressed by the court, the support trust effectively qualified for spendthrift trust protection under Montana's statute which disallows reaching the interest of a beneficiary in any support trust in a judgment at law until disbursed to the beneficiary.[161] The exception to spendthrift trusts for necessaries provided to the beneficiary is found where it would be an abuse of discretion for the trustee not to provide for the necessaries.[162] Similarly, in *Lindgren*, when the guard-

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State would seek to levy against the beneficiary in a court action timed to coincide with the trustee's distribution to the beneficiary. Telephone Interview with Bruce McGinnis, Tax Counsel, Montana Department of Revenue (Sept. 22, 1995).

156. MONT. CODE ANN. §§ 53-1-401 to -402, -501 (1995).

157. MONT. ADMIN. R. 20.11.108(2) (1984).

158. MONT. ADMIN. R. 20.11.112(4)(a)(1) (1984) (emphasis added).

159. 268 Mont. 96, 885 P.2d 1280 (1994).

160. *Lindgren*, 268 Mont. at 97-98, 885 P.2d at 1281.

161. MONT. CODE ANN. § 72-33-303 (1995).

162. *See generally supra* notes 113-14 and accompanying text.

ian of the beneficiary brought suit to require the trustee to make payments for the beneficiary's care, the court ordered the trustee to pay.[163] Thus, in this case, Montana law allowed a claim against the beneficiary's interest in a *de jure* spendthrift trust for necessaries provided to the beneficiary.

Similarly, the law regarding the exception for claims for the support of dependents of a beneficiary is ambiguous in Montana. Under Montana law, all property is subject to attachment to satisfy a support order.[164] Moreover, under enforcement of a support order, a support "lien applies to all real and personal property . . . that the obligor can afterward acquire."[165] A beneficiary could also be subject to a civil contempt order.[166] To purge the contempt, the beneficiary may "sell or transfer real or personal property or transfer real or personal property to the payee, even if the property is exempt from execution."[167]

Yet, the spendthrift statute bars any court-ordered lien from attaching to the interest of a beneficiary in a spendthrift trust, and also bars the beneficiary from selling or transferring his interest in a spendthrift trust to purge a contempt order.[168] The support order enforcement statute and the spendthrift trust statutes contradict each other. Whether a claim for dependent support can reach the interest of a beneficiary of a spendthrift trust is ambiguous. Alimony claims are probably even less able to invade the beneficiary's interest because the support order enforcement statutes do not enforce alimony claims.[169]

Finally, tort creditors under current Montana law cannot satisfy their claims out of the beneficiary's interest in a spendthrift trust. Under the statutes, the interest of the beneficiary of a spendthrift trust is not subject to any judgment order.[170] Sim-

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163. *Lindgren*, 268 Mont. at 100, 885 P.2d at 1282-83. The court, implying that the trustee had abused her discretion, stated:

> While the Trust states that the Trustee has sound discretion it also directs the Trustee to exercise that discretion "liberally" in favor of [the beneficiary]. There is nothing in the record to indicate that the Trustee adopted this liberal attitude toward the care of the Beneficiary. . . . The denial [by the trustee] was not in compliance with the purposes of the Trust.

Id.

164. MONT. CODE ANN. § 40-5-248 (1995). *See generally* Thomas W. Christie, *Child Support Enforcement in Montana*, 50 MONT. L. REV. 165 (1989).

165. MONT. CODE ANN. § 40-5-248(5) (1995).

166. MONT. CODE ANN. § 40-5-601 (1995).

167. MONT. CODE ANN. § 40-5-601(10)(d) (1995).

168. MONT. CODE ANN. §§ 72-33-301 to -302 (1995).

169. MONT. CODE ANN. § 40-5-248 (1995).

170. MONT. CODE ANN. §§ 72-33-301 to -302 (1995). *See generally supra* notes

ilarly, general contract creditors have no way to attach the beneficiary's interest to satisfy their claims.[171]

The one universally-held exception disallowing self-settled spendthrift trusts should be examined more closely. The law in all states, including Montana, has barred a settlor from escaping accountability for his own debts. This same idea applies equally to the beneficiary of a spendthrift trust. If society believes that a person should not be allowed to avoid his debts, it makes little sense to allow him to create a structure in which beneficiaries may avoid their debts. One may look favorably on the noble intent of the settlor to provide for another with his life's bounty, but a creditor is a creditor, and a debt is a debt.[172] Finally, statutes exempting a basic level of property from execution[173] and the bankruptcy code protect all debtors, including beneficiaries. Thus, the settlor's spendthrift trust is not the only source of protection for the beneficiary.

IV. RECOMMENDATIONS TO THE LEGISLATURE AND COURT

As Griswold put it, "[t]he difficulty comes not so much from the existence of spendthrift trusts as from their unrestrained extent."[174] Spendthrift trusts allow potential conflicts between the settlor's intent and the policy of satisfying worthy claims against the beneficiary's interest. The discretionary and support trust alternatives accomplish most of the goals of spendthrift trusts without creating the same policy dilemma. However, the spendthrift trust type need not be abolished. It is possible to imagine a situation in which a settlor wishes to provide for a completely incapacitated beneficiary, yet the settlor refuses to rely on the discretion of the trustee in a discretionary trust. The law should afford a settlor the power to protect a beneficiary without relinquishing control over distribution decisions to a trustee in a discretionary trust.

Nevertheless, the settlor's intent should not be absolute, as it is under Montana's current spendthrift trust doctrine. Montana's spendthrift trust laws conflict with codified policy goals. Montana's legislature should consider removing sections 72-33-301 and 72-33-302 of the Montana Code and replacing

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116-17 and accompanying text.

171. *See supra* notes 118-20 and accompanying text.

172. *But cf.* Hirsch, *supra* note 28.

173. MONT. CODE ANN. §§ 25-13-601 to -615 (1995).

174. GRISWOLD, *supra* note 1, § 556, at 639-40.

them with the following:

> RESTRAINT ON TRANSFER OF INCOME OR PRINCIPAL.
>
> (1) Except as provided in 72-33-305, if the trust instrument provides that a beneficiary's interest is not subject to voluntary or involuntary transfer, the beneficiary's interest in income or principal under the trust may not be transferred and is not subject to enforcement of a money judgment until paid to the beneficiary.
>
> (2) Such a provision, however, will not be valid as to one-half of the beneficiary's interest in income or principal.[175]
>
> (3) Claims against the transferable half of the beneficiary's interest shall be satisfied in the following order of priority:
>
> (a) claims for the education or necessary support of the beneficiary's children, and claims for the necessary support of the beneficiary's spouse;
>
> (b) claims for necessary services rendered or necessary supplies furnished to the beneficiary;
>
> (c) claims for tax obligations;
>
> (d) claims for fines arising from a violation of a statute, regulation, or ordinance;[176]
>
> (e) claims arising from a tortious act or omission by the beneficiary; and
>
> (f) other claims.
>
> In the case of multiple claims within each prioritized category, claims shall be satisfied in the order that notification of the claim was received by the trustee.[177]
>
> (4) Under this section, the claimant assumes the right to receive satisfaction of the claim in the same time and manner as the beneficiary would receive distribution under the terms of the trust, notwithstanding the restraint on voluntary or involuntary transfer.
>
> (5) If the trustee refuses to honor a claim and a claimant brings suit to enforce the claimant's right to recover from the trust pursuant to this section and the court enters a judgment in favor of the claimant, the claimant shall be entitled to recover costs and attorney's fees from the trust. Recovery under this

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175. This provision tracks the model statute for spendthrift trusts proposed by Professor Emanuel. Emanuel, *supra* note 46, at 208. Emanuel's model provision allows only one-third of the beneficiary's interest to be subject to the claims of creditors.

176. Note that, currently, MONT. CODE ANN. § 46-18-601 (1995) restricts liens for fines to only real property.

177. Clause three of this proposal borrows from Griswold's "Model Statute." GRISWOLD, *supra* note 1, § 565, at 647-48.

subsection shall be in addition to recovery under subsection (3).[178]

The proposed statute would certainly limit the protection of spendthrift trusts in Montana. However, by specifically allowing claims against only one-half the beneficiary's interest, it ensures that the other half is protected absolutely. One benefit of the statute is that, knowing that half his interest is subject to claims, the beneficiary may feel a positive pressure to prevent claims from arising against his interest. In this way, the beneficiary is encouraged toward financial responsibility, yet has an inviolable interest on which to rely. On the other hand, by capping access to the beneficiary's interest at one-half, valid claims may remain unsatisfied. Still, the statute does strike a compromise between the settlor's intent and the beneficiary's rights and responsibilities, a middle ground that does not exist under current law.

The proposed statute also poses the risk of litigation if parties differ over the interpretation of the word "necessary" in subsection three. Although some of this litigation might be avoided by incorporating a definition, each trust will have its own facts and the court, in its discretion, should set the parameters of "necessary" as appropriate in each case.[179]

The statute proposes to make spendthrift trust protection available to only half the beneficiary's interest in order to balance equally the intent of the settlor with the rights of creditors.[180] Access to half of a debtor's interest arises in other contexts: the surviving spouse may qualify to receive half of a decedent spouse's probate estate;[181] a claimant may reach half of armed forces retirement payments to satisfy child support and alimony obligations,[182] and claimants may reach half of any individual's disposable earnings to satisfy a support obligation of a spouse or dependent child.[183]

As an alternative to these statutory revisions, the Montana Supreme Court should use an active, critical analysis of the

178. This clause is adopted nearly verbatim from Emanuel's model statute for spendthrift trusts. Emanuel, *supra* note 46, at 208.

179. *See, e.g., In re* Estate of Lindgren, 268 Mont. 96, 100, 885 P.2d 1280, 1282 (1994).

180. *See* Emanuel, *supra* note 46, at 209.

181. MONT. CODE ANN. § 72-2-221 (1995).

182. 10 U.S.C. § 1408(e) (1994).

183. 15 U.S.C. § 1673(b)(2)(A) (1994). *But see* 15 U.S.C. § 1673(a) (1994) (restricting garnishment generally to only 25 percent of disposable earnings).

policies underlying spendthrift trusts. With the absence of reasons given by the legislature for the adoption of sections 72-33-301 and 72-33-302 of the Montana Code, the court should feel free to interpret the statutes to allow creditors to reach a beneficiary's interest in a spendthrift trust in cases presenting compelling policy issues. In so doing, the court may rely upon the majority of law in other states (including California, from which the current statute was derived without the exceptions). The Montana Supreme Court has recognized the power of public policy.[184] Spendthrift trusts pose important policy questions for the court to consider.

V. CONCLUSION

Spendthrift trusts serve effectively the settlor's intent to provide the beneficiary with a trust interest that is not subject to alienation. Montana's spendthrift trust law fully serves the settlor's intent. However, serving the settlor's intent is nonetheless a policy decision. Other policies, such as enforcing child support and reimbursing the provider for necessary services to the beneficiary, are equally compelling. One solution, proposed here, is to split the difference. Half of the beneficiary's interest will serve the settlor's intent, thus preventing voluntary and involuntary alienation of the trust interest. The other half of the beneficiary's interest will serve the beneficiary, thus allowing him to squander or responsibly fulfill his obligations as he (or a court) sees fit. Absent this solution, the policy dilemma will continue, with the threat of litigation just around the corner and trust practitioners left to wonder about the inviolability of the spendthrift trust provisions they draft for clients.

184. *See* Youngblood v. American States Ins. Co., 262 Mont. 391, 395, 866 P.2d 203, 205 (1993) (holding that public policy overrides contractual choice of law).